CHAPTER 7

GRIEVANCES AND ARBITRATION

7-1. Introduction.

Labor counselors are involved with grievance resolution and arbitration. The management team depends upon the labor counselor to perform these functions in a professional and competent manner. This requires a basic knowledge of the FSLMRS's provisions and private sector principles. It also requires the ability to perform as an accomplished advocate.

This chapter provides a basic analysis of the grievance and arbitration provisions of the FSLMRS.

7-2. Negotiated Grievance Procedures Under the FSLMRS.

Sections 7121(a)-(b) of the FSLMRS set out the statutory requirements for the public sector grievance process. Each collective bargaining agreement must have a grievance process which is fair, simple and expeditious. Additionally, the procedure must allow grievances by the exclusive representative and by employee on his own behalf. Finally, it must allow for invocation of binding arbitration by either the exclusive representative or the agency if the grievance is not settled satisfactorily. By these requirements, the FSLMRS has struck a balance between the sometimes competing or conflicting interests of the exclusive representative and the employee in the presentation and processing of grievances.

This procedure assures that the exclusive representative has the right to present and process grievances on its own behalf, or on behalf of any bargaining unit member. At the same time, it assures the employee the right to personally present a grievance without the assistance of the exclusive representative, although the exclusive representative still has the right to be present during any hearings on a grievance presented by an employee.

Black's Law Dictionary defines a grievance as "a complaint filed by an employee regarding working conditions and for resolution of which there is procedural machinery provided in the union contract." Black's Law Dictionary 632 (5th ed. 1979). The FSLMRS expands that definition. Instead of limiting grievances to complaints filed by employees, it also includes complaints filed by labor organizations and agencies concerning matters related to the employment of any employee, the effect or interpretation of a collective bargaining agreement, or any violation of law, rule, or regulation affecting conditions of employment. 5 U.S.C § 7103(a)(9).

Black's Law Dictionary also defines arbitration. It is "the reference of a dispute to an impartial [third] person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard." Black's Law Dictionary 96 (5th ed. 1979). The FSLMRS does not define arbitration, so in the federal sector we fall back on the common usage definition. Arbitration, therefore, is referring a dispute to someone who will hear both sides and make a decision by which the parties agree to be bound.

Putting those definitions together, grievance arbitration is a procedure or proceeding resulting from the voluntary contractual agreement of labor and management. Under this procedure, the parties submit unresolved disputes to an impartial third party for resolution. The parties have agreed in advance to accept this decision as final and binding. This is the process that is followed when a dispute goes to arbitration in the federal sector.

7-3. Public Sector v. Private Sector Arbitration.

As the proceeding definitions make clear, grievance arbitration in the federal sector is concerned with enforcing compliance with law and regulation as well as enforcing compliance with the collective bargaining agreement. In other words, all matters under law that could be submitted to the negotiated grievance procedure are included within the coverage of that procedure unless the parties negotiate specific exclusions.

These provisions are in significant contrast to private sector labor relations and collective bargaining, particularly in the structuring of what subjects are open to negotiation. In the private sector, organizations and unions negotiate matters into the grievance procedure. All matters not specifically addressed as being included under the procedure are excluded. In the public sector, the parties negotiate all matters not prohibited by law, unless they have been specifically negotiated out of coverage.

7-4. Matters Excluded from the Negotiated Grievance Procedure.

There are five matters excluded from coverage by sections 7121(c)(1)-(5) of the FSLMRS. They are (1) prohibited political activities; (2) retirement, life insurance, or health insurance; (3) a suspension or removal for national security reasons; (4) examination, certification, or appointment;[1] and (5) the classification of any position which does not result in the reduction-in-grade or pay of an employee. The parties, therefore, may negotiate any other matter unless it is specifically excluded through their negotiations, or otherwise excluded by law.[2]

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[1] *See* NFFE Local 1636 and NGB, Albuquerque, 48 FLRA 511 (1993).

[2] In addition to the matters mentioned in §7121(c), other matters which the have been found not subject to grievance and arbitration by the Authority or the Courts include:

The last area, the classification of any position which does not result in the reduction-in-grade or pay of an employee, has resulted in the most Authority decisions. The Authority has specifically advised that, where the substance of a dispute concerns the grade level of duties assigned and performed by the grievant, the grievance concerns the classification of a position within the meaning of the exclusion. FAA, 8 FLRA 532 (1988). Similarly, the Authority has held that actions concerning an employee's entitlement to grade and pay retention benefits are not grievable. For instance, reductions in grade made pursuant to position reclassifications are precluded

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(1) Grade and pay retention matters under § 5366(b). AFGE Local 3369 and SSA, New York, 16 FLRA 866 (1984) (When employees retain their grade and pay following certain reduction-in-force or reduction-in-grade actions, grievances are precluded over the action that was the basis for the grade and pay retention and over the termination of such benefits).

(2) Management rights and scope of the negotiated grievance procedure. AFGE Local 1345 and Fort Carson, 48 FLRA 168, 205 (1993)(The decision to contract out is a management right governed by OMB Circular A-76, a government-wide regulation. Grievances concerning the decision to contract out or claiming a failure to follow A-76 are barred); Newark Air Force Station and AFGE Local 2221, 30 FLRA 616 (1987) (Management rights are considered in connection with resolution of the grievance on the merits).

(3) Matters for exclusive resolution by the Authority. Duty to bargain. AFGE and Dep't of Education, 42 FLRA 1351 (1991) (Negotiability disputes over the extent of the duty to bargain must be resolved by the Authority. They may not be resolved by arbitrators); Bargaining-unit status. AAFES and AFGE, 37 FLRA 71 (1990) (An arbitrator is precluded from addressing the merits of a grievance whenever a grievability question has been raised regarding the bargaining-unit status of the grievant).

(4) Separation of probationary employees. Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983); Nellis Air Force Base and AFGE Local 1199, 46 FLRA 1323 (1993).

(5) Discipline of a National Guard civilian technician under § 709(e) of the Civilian Technicians Act of 1968: grievances are prohibited. NFFE Local 1623 and SCNG, 28 FLRA 633 (1987); ACT and Penn. AANG 14 FLRA 38 (1984).

(6) Discipline of a professional employee of the Department of Medicine & Surgery of the Department of Veterans Affairs: grievances are prohibited. NFFE and Veterans Admin., 31 FLRA 360, 364 (1988).

(7) An arbitrator may not review merits of an agency's security-clearance determination. Department of the Navy v. Egan, 484 U.S. 518 (1988); AFGE and Dep't of Education, 42 FLRA 527, 533 (1991).

(8) Where the substance of a grievance concerns whether the grievant is entitled to a temporary promotion by reason of having performed duties of a higher-graded position, the grievance does not concern the classification within the meaning of §7121(c)(5). SSA Office of Hearings and Appeals and AFGE Local 3627, 55 FLRA No. 131 (1999) (denying an agency's exceptions because the grievance concerned a claim that the employees had worked in a higher grade position and the issue was therefore arbitrable); AFGE Local 1617 and Kelly Air Force Base, 55 FLRA No. 55 (1999) (setting aside an arbitrator's award and finding that a grievance concerning an employee's entitlement to a temporary promotion based on the performance of higher level work was arbitrable.); Laborers Int'l Union of North America Local and Fort Sam Houston, 56 FLRA 324 (2000).

from grievance and arbitration. Social Security Administration, 16 FLRA 866 (1984); VA Medical Center, 16 FLRA 869 (1984). Finally, where the substance of the grievance concerns the grade level of duties performed by the grievant and the grievant has not been reduced in grade or pay, the grievance is precluded. MCAS, Cherry Point and IAMAW, Local 2297, 42 FLRA 795 (1991).

7-5. The Grievance/Arbitration Procedure.

The negotiated grievance procedure normally consists of three or four steps, depending upon how many levels of supervisors or appeal the employee or union has. A "typical" four-step employee grievance procedure is illustrated as follows:

Step 1. The aggrieved employee will informally discuss the grievance orally with his or her immediate supervisor within a specified number of days from the complained-of act. A decision will be rendered within a few days of the discussion. (This step is usually omitted when the agency or management files the grievance).

Step 2. If no satisfactory solution is reached, the employee may pursue the grievance by submitting the matter, in writing, within a specified number of days, to the activity head. The activity head will meet with the employee and union representative, discuss the matter, and render a written decision.

Step 3. If relief is denied, the grievant may pursue the matter further by submitting within a specified number of days, the written grievance and the Step 2 supervisor's decision to the Deputy Installation Commander for a decision. The Deputy Installation Commander will meet with the employee, his union representative, and the Civilian Personnel Officer to discuss the matter. A written decision will be rendered within a specified number of days.

Step 4. If the matter is still not resolved, the exclusive representative or management may refer the matter to binding arbitration. The employee cannot invoke binding arbitration on his own behalf. 5 U.S.C. § 7121(b)(3)(C).

Grievances should be disposed of at the lowest level possible. Complaints and disputes should be resolved at the grievance stage if at all possible. Unjustified resort to arbitration will add unnecessary cost, delay and uncertainty to the case, and may have an adverse effect on morale. Arbitration should be the rare exception rather than the rule.

Arbitration does have a cost associated with it. Arbitrators must be paid. Who pays those costs is determined by the collective bargaining agreement. As a part of negotiating the agreement, management and the exclusive representative should ensure that there is a payment provision. Normally, this is in the form of a cost sharing formula where each party pays a percentage.

7-6. Variety of Arbitrator Arrangements.

The collective bargaining agreement will contain the arbitration arrangement(s) agreed to by the parties. This may include the use of: (1) ad hoc arbitrators; (2) a permanent umpire; (3) tri-party boards; or (4) expedited procedures.

The use of ad hoc arbitrators is the mostly widely used arrangement in both the private and public sector. The ad hoc arbitrators are appointed to arbitrate particular cases between the parties. Upon completion of his office, the relationship with the parties ceases. While the parties may select an arbitrator from those that are personally known and acceptable to them, most likely the selection will be from a list of experienced labor arbitrators supplied by the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA).

If an installation generates a large number of arbitrations or if there is need for arbitrators who are acquainted with special needs or complexities, a permanent umpire or permanent panel of arbitrators may be provided for in the collective bargaining agreement. The appointment process will be greatly shortened. The presentation of cases will be expedited since the permanent arbitrator will not have to be "educated" about many of the standard details concerning the parties, and their operations and practices. Also the decisions of permanent umpires/arbitrators can be expected to be more consistent and sensitive to the particular circumstances of the parties.

Tri-party arbitration boards consist of a management member, a union member and a neutral member (usually an arbitrator selected through the FMCS or the AAA). Permanent tri-party panels have the advantages of the permanent umpire systems. They also provide each party direct participation in the decision process, with neutral member in the position of tiebreaker.

Expedited procedures are designed for the rapid processing of the "routine," minor disciplinary action grievances whose validity will turn on facts that can be proved, or other kinds of grievances which do not require any significant interpretation of the collective bargaining agreement. A rotating panel of selected arbitrators is used. The arbitrator at the top of the list is notified and is expected to be able to hear the case within a stipulated period. If this cannot be done, the next arbitrator will be called. Two or more short cases may be considered at a single hearing. The arbitrator will be required to issue a bench decision or decide the case within a few days. The award need not be accompanied by an opinion. Any opinion, if rendered, must be brief. Awards in expedited proceedings carry no precedential value and will not be released for publication.

7-7. Selection of the Arbitrator.

The selection of an ad hoc arbitrator, and the selection of initial or replacement members of the panel, should be done on the best information available to the parties. The FMCS and the AAA both keep lists of arbitrators. If all of the parties listed are

strangers to your organization, the agencies which provide the lists will provide biographical sketches. You should also check published opinions written by the various arbitrators on the lists to see if they address points in a manner which seems fair and reasonable. Finally, you should talk with other agencies that have recently been through arbitration proceedings for recommendations.

The actual process of picking an arbitrator is a lot like voir dire. The negotiating teams will first review the lists of arbitrators. When the parties meet, each side will take turns striking names until you have a list remaining of those arbitrators who are mutually acceptable. The parties will then rank order the remaining arbitrators. The arbitrators will be contacted in that order of preference until one is available.

7-8. The Hearing.

The parties are generally responsible for the arrangements for the arbitration hearing. If an official transcript is to be made, you must schedule a court reporter. Unless the collective bargaining agreement provides otherwise, an official transcript should only be taken if it is justified by the seriousness of the case. Usually, even complicated cases may be adequately handled by making an informal tape recording and providing the tape to the arbitrator.

The location of the hearing will normally be left to the discretion of the parties. Usually it will take place in a room on the premises of the agency or in the union hall, but it may be scheduled at some "neutral" location, such as a public courtroom, library or a motel conference room. The hearing room must provide a quiet, adequate and comfortable environment for a proceeding that may last for a number of hours.

Arrangements for assuring the attendance of witnesses should be made. It is likely that the bulk of witnesses will be government employees. These persons should be identified and the parties should assure that they will be present at the hearing place or that they can be expected to respond promptly when called from their work place. If witnesses are to be sequestered, a comfortable place for them to wait should be provided.

Discovery for arbitration hearings is not addressed in the statute, but the record of a candid and thorough processing of the case through all stages of the grievance procedure should be an adequate substitute for discovery.

The arbitrator is in charge of the hearing and will make determinations such as whether witnesses will be sworn or unsworn, if witnesses will be allowed to stay in the room after their testimony, and what evidence will be allowed. Normally, all relevant evidence is allowed, including hearsay. However, evidence concerning settlement offers and negotiations will be excluded. If classified evidence is an essential part of an arbitration case, the parties should ensure that the arbitrator selected has a security clearance sufficient to receive such information.

Ordinarily the burden of persuasion will lie with the grievant. Discipline cases are the exception to the rule. In those cases, management will bear the burden of justifying the disciplinary action that was taken. Once the party with the burden of proof has established a prima facie case, the burden "shifts" to the other party to rebut, mitigate or otherwise defend as they are able. Unless otherwise expressly provided, the arbitrator may fix the standard of proof. *See* Department of Defense, Dependents Schools, 4 FLRA 412 (1980). In most instances the quantum of proof will be "preponderance of the evidence."

Arbitration hearings will seldom last more than one day. Continuances or adjournments for good cause should be granted at the request of either party. An improper refusal may provide the basis for vacating the award, require a reopening of the case, or affect the weight that will be given the award in a collateral proceeding.

7-9. Remedies.

In the federal sector it is recognized that arbitrators have broad remedial powers. *See* Veterans Administration Hospital, Newington CN, 5 FLRA 64 (1981). The arbitrator may order parties to conform their conduct to the requirements of the collective bargaining agreement, either in general terms or in detail, or the arbitrator may prohibit conduct which violates the collective bargaining agreement. In non-disciplinary cases, a "make whole" remedy may be ordered which could include payment for lost economic opportunities, compensatory overtime opportunities, promotion or promotion preferences.

For a promotion remedy to be sustained, it is necessary to prove that an unwarranted action was taken and that "but for" that action the grieving employee would have received the promotion. *See* National Bureau of Standards, Washington, DC, 3 FLRA 614 (1980). When no causal connection is proven the appropriate remedy is priority consideration at the next promotion opportunity. *See* Naval Mine Engineering Facility, 5 FLRA 452 (1981). Similarly, although retroactive promotion may be a proper remedy under certain circumstances, it cannot be made if the grievant was not qualified for the position at the time of the improper action, Adjutant General of Michigan, 11 FLRA 13 (1983), or if the position was not established at that time, SEIU Local 200, 10 FLRA 49 (1982). It is proper in those circumstances for the arbitrator to order that a grievant receive "special consideration" during the next round of promotions. ACTION, 11 FLRA 514 (1983). Also, if the arbitrator orders a promotion re-run, he may not restrict the candidates to the original group considered. Defense Contract Administration, 10 FLRA 547 (1982).

In disciplinary cases the remedy may include reinstatement (absolute or conditional), with or without back pay, or a reduction of the discipline that was assessed. The arbitrator is not required to compute the exact amount of economic damages that are to be awarded. The award will be considered complete and final if a formula is provided for the parties to follow. On rare occasions, an additional hearing may be

necessary to implement the award. An award that requires the performance of a useless act may not be enforced.

7-10. Review of Arbitration Awards by the FLRA Under 5 U.S.C. § 7122(a).

Unlike the private sector, where arbitration awards are submitted for judicial review, review of most cases in the federal sector is by filing exceptions to the award with the FLRA under 5 U.S.C. § 7122(a). Section 7122(a) to the FSLMRS provides:

> (a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient-
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> (1) because it is contrary to any law, rule, or regulation; or
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> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
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> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

a. "Either Party."

The introductory language states that "either party" may file an exception to the award. Party is defined in the Authority's rules as any person who participated in a matter where the award of an arbitrator was issued. This means that generally only the union and the agency are entitled to file exceptions because they were the only parties to arbitration proceeding. Remember that the employee cannot invoke arbitration on his own, and is not a party. Therefore, the employee may not take exception. In those cases where a grieving employee files an exception, the Authority will dismiss the exception. Oklahoma Air Logistics Center and AFGE, 49 FLRA 1068 (1994), request for reconsideration denied 50 FLRA 5 (1994).

An agency is not precluded from filing exceptions with the Authority when it does not attend the arbitration hearing. Dep't of Navy, Mare Island and Federal Employees Metal Trades Council, 53 FLRA 390 (1997); Golden Gate Nat'l Recreation Area and Laborers' Int'l Union of North America, Local 1276, 55 FLRA 193 (1999); I.R.S., 56 FLRA 393 (2000). Generally, however, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. 5 C.F.R. § 2429.5. *See* Panama Area Maritime Metal Trades Council and Panama Canal Commission, 55 FLRA No. 193

(1999) (Authority dismissed union's exceptions to the award because those exceptions related to the agency's last best offer which the union did not raise at the arbitration); SSA Office of Hearings and Appeals and AFGE Local 3627, 55 FLRA No. 131 (1999).

b. "Other Than An Award Relating To A Matter Described In Section 7121(f) Of This Title."

The next important provision is the parenthetical stating "other than an award relating to a matter described in § 7121(f)." Pursuant to this provision, arbitration awards relating to a matter described in that section are not subject to review by the Authority and exceptions filed to such awards will be dismissed for lack of jurisdiction. Those matters primarily covered by § 7121(f) are those matters covered by §§ 4303 and 7512 of the CSRA.

Section 7121(f) provides for review of § 4303 (unacceptable performance) and § 7512 (misconduct) matters, and similar matters that arise under other personnel systems. These matters can involve an arbitration award because the employee has an option of filing an appeal with MSPB, or other agency, or of filing a grievance.
Review of awards relating to § 7121(f) matters.

When a § 4303 or a § 7512 action takes place, the aggrieved employee has the option of filing an appeal to the Merit Systems Protection Board (MSPB) or filing a grievance under the negotiated grievance procedure. If the grievance option is selected and the grievance goes to arbitration, two things differ from other arbitrations.

First, even though the arbitrator makes the decision rather than the MSPB or Equal Employment Opportunity Commission (EEOC), he must still apply the same statutory standards as applied by the MSPB. This includes the evidentiary standards and harmful error rule of § 7701(c) used by the MSPB, as well as the prohibitions of § 7701(c)(2) that an agency decision may not be sustained if based on a prohibited personnel practice or if not in accordance with the law. Cornelius v. Nutt, 472 U.S. 648 (1985) (harmful-error rule in arbitration).

Second, appeal is not to the FLRA as with other arbitration decisions.[3] Judicial review is available in the same manner and under the same conditions as if the matter

[3] Notwithstanding the rule that these decisions are not subject to review by the FLRA, twice in 1996 the Authority reviewed such actions. In both cases they reversed the arbitrator's decision granting back pay. On appeal to the United States Court of Appeals for the D.C. Circuit, both cases were dismissed for lack of jurisdiction under 5 U.S.C. § 7123. AFGE, Local 2986 and U.S. DoD, National Guard Bureau, Oregon, 51 FLRA 1549 (1996) (Petition for judicial review dismissed, AFGE, Local 2986 v. FLRA, 130 F.3d 450 (D.C. Cir. 1997)); U.S. DoD, National Guard Bureau, Idaho and AFGE, Local 3006, 51 FLRA 1693 (1996) (Petition for judicial review dismissed AFGE, Local 3006 v. FLRA, 130 F.3d 450 (D.C. Cir. 1997)).*But see* FAA v. Nat'l Assoc. of Air Traffic Specialists, 54 FLRA 235 (1998) (stating that the Authority lacked jurisdiction to hear such actions).

had been decided by the MSPB. For an MSPB type case, appeal is to the U.S. Court of Appeals for the Federal Circuit, and for an EEO type case appeal is to the Federal Circuit Court of Appeals.

Agencies have no right of appeal in these cases, but the Director of OPM may obtain review of arbitrators' decisions in limited circumstances. The Director must establish that the award misinterpreted civil service law or regulation and that the error will have a substantial impact on civil service law and regulation. 5 U.S.C. § 7703(d); Devine v. Nutt, 718 F.2d 1048 (Fed. Cir. 1983), rev'd as to other matters sub nom. Cornelius v. Nutt, 472 U.S. 648 (1985); Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983).

c. Time Limits.

One provision that is critical to the review of arbitration awards is the thirty-day filing period. If no exception is filed within that period, the award becomes final and binding. 5 U.S.C. § 7122(b). The thirty-day period begins on the day the award is served. 5 C.F.R. § 2425.1(b). It is jurisdictional and cannot be waived or extended. 5 C.F.R. § 2429.23(d); Dept of Interior, BIA Billings Area Office and NFFE LOCAL 478, 38 FLRA 256 (1990); Dep't of Transportation Federal Aviation Administration and Nat'l Air Traffic Controllers Ass'n, 55 FLRA 293 (1999), petition for review filed sub nom. Department of Transportation, Federal Aviation Admin., Northwest Mountain Region, Renton, Washington v. FLRA, No. 99-1165 (D.C. Cir. Apr. 29, 1999).

This provision is modified if the thirtieth day is a Saturday, Sunday, or federal holiday, or unless the award was served by mail. If the thirtieth day is a Saturday, Sunday, or federal holiday, the exception must be filed by the next day that is not a Saturday, Sunday, or federal holiday. 5 C.F.R. § 2429.21(a). If the award was served by mail, five days are added to the filing period after the thirty-day period is first computed taking into account weekends and holidays. The additional five-day period is also extended if the 5th day falls on a weekend or holiday. 5 C.F.R. § 2429.22.

If the exception is filed by mail, the date of the postmark is the day of filing. 5 C.F.R. § 2429.21(b). In the absence of a postmark, the date of filing is determined to be the date of receipt minus five days. VA Medical Center, 29 FLRA 51(1987) (Authority would not consider proof that the letter had been filed more than five days earlier).

Filing by personal delivery is accomplished the day that the Authority receives the documents.

d. Compliance.

Another provision contained in § 7122(b) that is critical is the compliance provision. The provision provides that if an exception is not timely filed, the award is binding and that the parties must take the action required by the award. In other words,

compliance with final awards is required, and failure to comply is an unfair labor practice. The Authority has reviewed this provision in three types of cases.

(1) Awards as to which no timely exceptions are filed. In this type of case the Authority has held that the award became final, and compliance with the award was required, when the thirty-day period for filing exceptions expired. Therefore, they will not review any exceptions filed after the time period expires. The Authority has also interpreted § 7122(b) as prohibiting a challenge to the award in a ULP proceeding where the ULP was refusal to implement the award. Review in these ULP proceedings will focus solely on whether or not there has been compliance with the award. They will not address exceptions to the arbitrator's decision. Wright Patterson AFB and AFGE, 15 FLRA 151 (1984), *aff'd* Department of the Air Force v. FLRA, 775 F.2d 727 (6th Cir. 1985).

(2) Awards as to which exceptions have been denied by the Authority. In these cases, the award becomes final when the exceptions are denied. The Authority will not, therefore, re-litigate in a ULP the denial of the exceptions. That is because the Authority views these proceedings as an attempt to obtain judicial review of the Authority's decision by an indirect path since direct judicial review is limited.[4] Bureau of Prisons and AFGE, 20 FLRA 39 (1985), *enforced* Bureau of Prisons v. FLRA, 792 F.2d 25 (2d Cir. 1986); U.S. Marshals Service and AFGE, 13 FLRA 351 (1983), *enforced* Marshals Service v. FLRA, 778 F.2d 1432 (9th Cir. 1985).

(3) Awards as to which timely exceptions have been filed and are pending. The obligation to comply with a final arbitration award has also been addressed in cases when timely exceptions have been filed and are pending before the Authority, but no stay of the arbitration award has been requested. *See* U.S. Soldier's and Airmen's Home and AFGE, 15 FLRA 139 (1984), *vacated and remanded* AFGE Local 3090 v. FLRA, 777 F.2d 751 (D.C. Cir. 1985). When timely exceptions are filed the award, by definition, is not final while the exceptions are pending. Therefore, compliance is not required under section 7122(b). In order to clarify this rule, the Authority, in 1985, revoked the provisions for requesting a stay of an arbitration award in conjunction with the filing exceptions. 52 Fed. Reg. 45754.

e. Scope of Review.

Although Congress specifically provided for review of arbitration awards in § 7122(a), at the same time, Congress expressly made clear that the scope of that review is very limited. The Conference Report that accompanied the CSRA when it was signed into law indicated that the Authority would be authorized to review an arbitrator's awards on very narrow grounds, similar to those used in the private sector. Thus, the Authority's approach is to presume that the award is proper, and only when it is expressly established that the award is deficient on one of the specific grounds set forth in § 7122(a) will it be vacated or modified by the Authority.

[4] *See* paragraph 7-12 of this text for a discussion of judicial review of arbitration decisions.

f. Grounds for Review.

(1) Awards Contrary to Law, Rule or Regulation. 5 U.S.C. § 7122(a)(1).

Section 7122(a) specifies the grounds on which the Authority may review arbitration awards. The most common ground for review is that the award is contrary to a law, rule, or regulation. In this respect, the Authority has indicated that an arbitrator in the federal sector cannot ignore the application of law and regulation. There is a framework that governs the relationship between federal employees and the federal government. The arbitrator in the federal sector, unlike the private sector, cannot limit consideration solely to the collective bargaining agreement. The federal sector arbitrator must look to any provisions of law or regulation which govern the matter in dispute.

Some common provisions of the FSLMRS which impact upon arbitration are §§ 7106(a), 7116(d), and 7121(d). Section 7106(a) makes it clear that no arbitration award may improperly deny the authority of an agency to exercise any of its rights. 5 U.S.C. § 7106(a); SSA and AFGE, 55 FLRA No. 173 (1999) (denying agency exception because it elected to bargain permissive topics in the CBA and the arbitrator enforced that election); NLRB and NLRB Professional Assoc., 50 FLRA 88 (1995); IRS v. FLRA, 110 S. Ct. 1623 (1990). Additionally, when, in the discretion of the aggrieved party, an issue has been raised under the ULP procedures, the issue may not be raised subsequently as a grievance. 5 U.S.C. § 7116(d); EEOC and AFGE, 48 FLRA 822 (1993); *but see* Point Arena Air Force Station and NAGE Local R12-85, 51 FLRA 797 (1996)(Same facts may support both ULP and grievance where different legal theories apply). Finally, when an employee affected by prohibited EEO discrimination has timely raised the matter under an applicable statutory procedure, the matter subsequently may not be raised as a grievance. 5 U.S.C. § 7121(d); INS, El Paso and AFGE, Local 1929, 40 FLRA 43 (1991).

Another statute which is frequently raised in these decisions is the Back Pay Act, 5 U.S.C. § 5596. Any back pay remedy subject to the Act must satisfy its requirements. In this regard, the Authority has consistently stated that the Act requires, not only a determination that the aggrieved employee was affected by an unjustified or unwarranted personnel action, but also a determination that the action directly resulted in the loss of pay. HHS, Family Support Administration, 42 FLRA 347, 357 (1991); VA Medical Center Kansas City and AFGE Local 2663, 51 FLRA 762 (1996); Alabama Ass'n of Civilian Technicians and Alabama Nat'l Guard, 54 FLRA 229 (1998); HHS and NTEU, 54 FLRA 1210 (1998). In other words, but for the complained of action, the grievant would not have suffered a pay loss. As a result of a 1999 interim regulation, back pay awards now have a six-year statute of limitations. *See* 64 Fed. Reg. 72,457 (28 Dec. 1999) (implementing section 1104 of Public Law 105-261, the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999).

Further, the employee is entitled, upon correction of a back pay action, to receive reasonable attorney's fees. HHS, Public Health Service, Region IV and NTEU, 34

FLRA 823 (1990); U.S. Dep't of Defense & Federal Ed. Assoc., 54 FLRA No. 79 (1998). These fees will be awarded in accordance with the standards set forth in § 7701 that the award of fees be in the interest of justice and the result of a fully articulated, reasoned decision. Finally, parties are not required to request, and arbitrator is not required to decide requests for, attorney fees before award of back pay becomes final. Customs Service, Nogales, Arizona and NTEU Chapter 116, 48 FLRA 938 (1993); U.S. Dep't of Veterans Affairs & Nat'l Assoc. of Gov't Employees, 53 FLRA 1426 (1998).

A third law that has been the basis for review of arbitration decisions is the Privacy Act. Federal Correctional Facility, El Reno, Oklahoma and AFGE Local 171, 51 FLRA 584 (1995).

Similar to awards contrary to law, awards that conflict with regulations that govern the matter in dispute will be found deficient. DODDS and OEA, 48 FLRA 979 (1993); Dep't of Army and AFGE, 37 FLRA 186 (1990). Sometimes, however, the regulation at issue will not govern the matter. When both a regulation and the collective bargaining agreement address a matter, and the two conflict, you must look to the level of the regulation to see whether it governs the matter in dispute.

Government-wide regulations govern a matter in dispute even if the same matter is covered by a collective bargaining agreement. Agency regulations govern a matter in dispute only when the matter is not covered by a collective bargaining agreement. In other words, an arbitration award may never conflict with government-wide regulations, but may conflict with agency regulations if the matter is also covered by the CBA, and the CBA supports the arbitrator's ruling.

In a similar issue, the Authority has denied a union's exceptions to an arbitrator's award in an Environmental Differential Pay dispute when the arbitrator properly applied the OSHA asbestos standards which the parties had previously negotiated as the appropriate standard. AFGE Local 2004 and Defense Logistics Agency, 55 FLRA No. 2 (1998).

(2) On other grounds similar to those applied by Federal courts in private sector labor-management relations. 5 U.S.C. § 7122(a)(2).

Arbitration awards may also be reviewed on grounds similar those applied by the federal courts in private sector disputes. These grounds include:

(a) The arbitrator failed to conduct a fair hearing. The Authority has held that an arbitrator has considerable latitude in the conduct of a hearing and that a claim that the hearing was conducted in a manner objectionable to the grievant will not support an allegation that the hearing was unfair. An arbitrator's refusal to hear relevant and material evidence may constitute denial of a fair hearing. *See* DA, Fort Campbell and AFGE Local 2022, 39 FLRA 994 (1991); Carswell AFB and AFGE Local 1364, 31 FLRA 620, 629-630 (1988); DHHS and AFGE, 24 FLRA 959 (1986).

(b) The arbitrator was biased or partial; the arbitrator was guilty of misconduct which prejudiced the rights of a party; or the award was obtained by fraud or undue means. Arbitrators are under an obligation to disclose any circumstances, associations, or relationships which might reasonably raise doubt about their partiality or technical qualifications in any case. If either party declines to waive a presumptive disqualification, the arbitrator should withdraw from the case. Impartiality or bias, preexisting or that which may occur subsequent to appointment, may provide the basis to vacate the award. *See* AFLC Hill AFB and AFGE Local 1592, 34 FLRA 986 (1990).

(c) The award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. In order to find an award deficient on this ground there must be a showing that it was so unclear or uncertain that it cannot be implemented. Currently, no appealing party has met this burden and all such exceptions have been denied. *See* Delaware National Guard and Association of Civilian Technicians, 5 FLRA 50 (1981).

(d) The arbitrator exceeded his authority. Arbitrators exceed their authority if they resolve an issue that was not submitted by the parties for resolution. *See* Dep't. of Navy, Puget Sound Shipyard and AFGE Local 48, 53 FLRA 1445 (1998); Bremerton Metal Trades Council and Puget Sound Naval Shipyard, 47 FLRA 406 (1993); VA and AFGE, 24 FLRA 447 (1986). They may also exceed their authority by extending an award to cover employees outside of the bargaining unit (Bureau of Indian Affairs and NFFE, 25 FLRA 902 (1987)); ordering agencies to take actions outside of their authority, (Academy of Health Sciences Fort Sam Houston and NFFE Local 28, 34 FLRA 598 (1990)); or extending the awards to cover employees who did not file grievances SSA and AFGE Local 3509, 53 FLRA 43 (1997); Tinker AFB and AFGE Local 916, 42 FLRA 680 (1991)). Finally, the Authority will find an award deficient when the arbitrator rendered the award in disregard of a plain and specific limitation on the arbitrator's authority. McGuire AFB and AFGE Local 1778, 3 FLRA 253 (1980).

(e) The award is based on a non-fact. An award is based on a non-fact when the central fact underlying the award is clearly erroneous. *See* U.S. Dep't of Defense and AFGE Local 916, 53 FLRA 460 (1997); Fort Richardson and AFGE Local 1834, 35 FLRA 42 (1990); Redstone Arsenal and AFGE, 18 FLRA 374 (1985); Kelly AFB and AFGE, 6 FLRA 292 (1981). To find an award deficient on this grounds, it must be shown that the alleged non-fact was central to the result of the award, the information was clearly erroneous, and that but for the arbitrator's misapprehension, the arbitrator would have reached a different result. It must also be shown that the arbitrator not only erred in his view of the facts, but that the sole articulated basis for the award was clearly in error. Finally, it must be shown that the evidence discloses a clear mistake of fact, but for which, in accordance with the expressed rationale of the arbitrator, a different result would have been reached. Redstone Arsenal, 18 FLRA at 375.

(f) The award is contrary to public policy. This ground is extremely narrow. In order to find an award deficient the public policy in question must be explicit, well defined, and dominate. In addition, the policy must be ascertained by reference to legal precedents, not general considerations of supposed public interest. *See* Long Beach Naval Shipyard and FEMTC, 48 FLRA 612 (1993).

(g) The award does not draw its essence from CBA. This has been described as an award which is so confounded in reason or fact, or so unconnected with the wording or purposes of the CBA, that it manifests a disregard for the agreement or does not present a plausible interpretation of it. Naval Mine Warfare Engineering Activity, Yorktown, Virginia and NAGE, 39 FLRA 1207 (1991). This is such a stringent standard that these exceptions are rarely sustained.

7-11. Appeal Of Grievances Under § 7121(d).

This section of the FSLMRS involves review of mixed cases and equal employment opportunity matters. Mixed cases are those in which the agency takes an action against the employee that is appealable to the MSPB, and the employee asserts that the action was taken on the basis of discrimination. Common examples are removal or demotion for unacceptable performance or a serious adverse actin alleged by the employee to have been based on his race, gender, or some other improper reason. Equal employment cases are those involve pure discrimination. These are allegations of employment discrimination within the jurisdiction of the EEOC that do not involve matters appealable to the MSPB. This type of case commonly involves a claim of discrimination as a result of a failure to be promoted.

An aggrieved employee affected by either of these types of actions may raise the matter under a statutory procedure or under the negotiated grievance procedure, but not under both avenues. If he selects the negotiated grievance procedure, he may still select appeal the to MSPB or EEOC if that review procedure would have been available under the statutory procedure. In other words, the employee doesn't lose his appeal rights by going to the negotiated grievance procedure.

7-12. Judicial Review of FLRA Arbitration Decisions.

In contrast to most other decisions of the Authority, the Authority's arbitration decisions are generally not subject to judicial review. 5 U.S.C. § 7123(a). This is because the Authority's review is so limited that subsequent review by the courts of appeals would be inappropriate.

a. Arbitration Awards that Involve ULPs.

An exception to the rule is found in 5 U.S.C. § 7123(a). A circuit court can review a final decision of the FLRA involving an arbitrator's award if an unfair labor practice is involved. NTEU v. FLRA 112 F.3d 402 (9th Cir. 1997). Although the precise meaning

of § 7123(a) is still uncertain, the courts have generally construed the provision narrowly. Circuit courts have held that there is no jurisdiction in these cases unless a ULP is either a necessary or explicit grounds for the final order of the FLRA. There is no jurisdiction where the CBA was the basis for the arbitration award and the Authority's review, because to grant judicial review whenever a CBA dispute can also be viewed as an ULP would give too little scope and effect to the arbitration process. It would also thwart the final review function of the Authority which Congress made central to the FSLMRS. *See* Overseas Education Association v. FLRA, 824 F.2d 61 (D.C. Cir. 1987); U.S. Marshals Service v. FLRA, 708 F.2d 1417 (9th Cir. 1983).

There is a recent split in the circuits, however, on this issue. In U.S. Customs Service v. FLRA, 43 F.3d 682 (D.C. Cir. 1994), the customs service appealed an FLRA decision[5] upholding a decision by an arbitrator concerning the application of a statute concerning the boarding of ships. The D.C. Circuit held that, even in the absence of a ULP, it could review the decision of the Authority concerning an arbitration decision for the limited purpose of determining whether the Authority exceeded its jurisdiction. The FLRA followed the D.C. Circuit's reasoning in reviewing exceptions to an arbitrator's award concerning the same statute in U.S. Customs Service v. NTEU, 50 FLRA 656 (1995). This time the case was appealed to the 9th Circuit. It refused to hear the case finding, in disagreement with the D.C. Circuit and in affirmation of previous precedent, that it lacked jurisdiction to review an Authority decision concerning an arbitration exception that did not involve an unfair labor practice.

b. Review of Arbitration Awards Under 5 U.S.C. § 7121(f).[6]

[5] U.S. Customs Service and NTEU, 46 FLRA 1433 (1993).

[6] *See* paragraph 7-10.b. of this text.